(22,191)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 296.

ANNE SWEENEY, PLAINTIFF IN ERROR,

vs.

WILLIAM G. ERVING.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

No. 2094.

ANNE E. SWEENEY, Appellant,
vs.
WILLIAM G. ERVING.

Supreme Court of the District of Columbia.

At Law. No. 50008.

ANNE SWEENEY, Plaintiff,
vs.
WILLIAM G. ERVING, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

Declaration.

Filed Dec. 4, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50008.

ANNE SWEENEY, Plaintiff,
vs.
WILLIAM G. ERVING, Defendant.

1. The plaintiff, Anne Sweeney, sues the defendant, William G. Erving, for that, Whereas, at and before the time of the committing by the defendant of the grievances hereinafter complained of the defendant, at the City of Washington, in the District of Columbia, was engaged in practice as a physician and surgeon and also as an operator of a certain apparatus in his possession and used by him for diagnostic purposes by means of the X-ray and represented himself to the public as a skillful physician and surgeon and also as
2 skilled in the use and operation of said apparatus; And the plaintiff says that heretofore, to wit, on the 30th day of May, 1905, at the City aforesaid, the plaintiff, believing the said representations to be true and relying thereon, employed the defendant to

make a diagnosis, with the aid and by the use of said apparatus and by means of said X-ray, as to whether or not the plaintiff had sustained a fracture of one of her ribs, and the defendant then and there accepted and entered upon said employment, by reason whereof it then and there became and was the duty of the defendant properly and skillfully to make said diagnosis; but the plaintiff says, the defendant then and there in the course of his said employment conducted himself and operated said apparatus in an ignorant, unskillful and negligent manner, whereby the plaintiff's back and other portions of her body were severely burned and otherwise injured and her life endangered and in consequence thereof the plaintiff was for a long space of time delirious and has suffered and will hereafter suffer from neuralgia and intense physical and mental anguish and has incurred great expense, to wit, the sum of One thousand dollars, in and about her efforts to be cured of said injuries and will hereafter incur further great expense in and about her efforts to effect such cure and to obtain relief from the sufferings caused by said injuries and has ever since the date last above mentioned been and ever will be wholly unable to perform any labor or to earn a living for herself and has been deprived of the moneys, to wit, the sum of Two thousand dollars, which she otherwise would have heretofore have earned since the date last aforesaid and will be deprived of large sums of money which she would otherwise earn hereafter; and the plaintiff says that by reason of the premises she has been injured and damaged in the sum of Twenty-five thousand dollars; Wherefore the plaintiff claims judgment for Twenty-five thousand dollars ($25,000); besides costs of suit.

2. And the plaintiff also sues the defendant for that heretofore, to wit, on the 30th day of May, 1905, the defendant undertook, upon his own special instance and request and with the consent of the plaintiff, to make and entered upon the making of a certain Xray test upon the plaintiff's body with a certain apparatus then in the possession and under the control of the defendant and it thereby became and was the duty of the defendant to exercise due care in making said test; but the plaintiff says, the defendant in making said test, did not exercise due care, but negligently burnt and otherwise injured the back and other parts of the body of the plaintiff, in consequence whereof her life was endangered and for a long space of time she was delirious and ever since the date last aforesaid she has suffered and will hereafter ever suffer great physical and mental pain and has incurred great expense, to wit, $1,000. in her efforts to be cured of said injuries and will be put to further great expense hereafter in her further efforts to effect said cure and to relieve her sufferings caused by said injuries and has been and ever will be wholly unable to perform any labor or to earn a living for herself and has been deprived of the moneys, to
3 wit, the sum of $2,000. which otherwise she would heretofore have earned since the date last aforesaid and will be deprived of large sums of money which otherwise she would earn hereafter and has been thereby and otherwise injured and damaged in the sum

of $25,000. And the plaintiff claims judgment for $25,000 besides costs of suit.

LORENZO A. BAILEY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

LORENZO A. BAILEY,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

I, Anne Sweeney, do solemnly swear, that I am a citizen of the United States; that I am the plaintiff named in the above entitled suit and in the declaration hereto attached wherein William G. Erving is named as defendant; that on or about the 30th day of May, 1905, I sustained the burns and injuries at the hands of the defendant in consequence of his negligence in the manner and by the means stated in said declaration and that I have been ever since then by reason of said injuries helpless and wholly unable to do any kind of work; that at and before the day last above mentioned I was employed as housekeeper for the Belgian Minister in the City of Washington, D. C., and came to the City of Philadelphia to remain at the home of my sister while suffering from said injuries and with the intention to return to said city of Washington as soon as I shall be able to resume said employment if I shall ever sufficiently recover from said injuries to do so; that I am advised by counsel and believe I have a good cause of action against the defendant as set forth in the said declaration which is hereby referred to; that I am without means and wholly unable to make any deposit with said declaration or to pay or give security to pay the cost of instituting or prosecuting said suit and I desire with the leave of the Court to institute and prosecute said suit without making such payment or deposit and without giving such security.

ANNE SWEENEY.

Subscribed and sworn to before me this 3rd day of December, A. D. 1907.

F. M. BROWER, [SEAL.]
Notary Public, 2313 *E. Cumberland St.,*
Philadelphia, Pa.

Commission expires January 16, 1909.

(Endorsed.)

Let this suit be instituted without deposit for costs.

THOS. H. ANDERSON, *Justice.*

4 *Plea of Defendant.*

Filed May 15, 1908.

In the Supreme Court of the District of Columbia.

No. 50008.

ANNE SWEENEY, Plaintiff,
vs.
WILLIAM G. ERVING, Defendant.

The defendant for a plea to the plaintiff's declaration, in the above entitled cause, and each count thereof, says he is not guilty as therein alleged.

A. S. WORTHINGTON,
Attorney for Defendant.

Joinder in Issue.

Filed May 18, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50008.

ANNE SWEENEY, Plaintiff,
vs.
WILLIAM G. ERVING, Defendant.

The plaintiff joins issue upon each of the defendant's pleas.

LORENZO A. BAILEY,
Attorney for Plaintiff.

Memorandum.

February 9, 1909.—Verdict for Defendant.

Supreme Court of the District of Columbia, Friday, June 18, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

At Law. No. 50008.

ANNE SWEENEY, Pl't'f,
vs.
WILLIAM G. ERVING, Def't.

This cause coming on to be heard upon the plaintiff's motion for a new trial, the same having heretofore been argued and submitted,

it is considered that said motion be and it is hereby overruled, and judgment on verdict ordered.

5 Therefore it is considered that the Plaintiff take nothing by her suit, and that the defendant go thereof without day and recover against the plaintiff the costs of his defense, to be taxed by the Clerk and have execution thereof.

The plaintiff in open court notes an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond for costs on said appeal, is hereby fixed in the sum of one hundred dollars ($100).

Memoranda.

July 12, 1909.—Appeal bond approved and filed.

July 12, 1909.—Time to file record extended from time to time to and including December 1, 1909.

August 13, 1909.—Time to submit Bill of Exceptions extended to October 15, 1909.

September 14, 1909.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia, Friday, October 29, 1909.

By Justice Stafford.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 50008.

ANNE SWEENEY, Pl't'f,
vs.
WILLIAM G. ERVING, Def't.

Now comes here the plaintiff by her Attorney and prays the Court to sign, seal and make part of the record, her bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

Upon motion of the plaintiff it is ordered that the time within which to file the transcript of record in this cause in the Court of Appeals of the District of Columbia, be, and it is hereby extended to and including December 1, 1909.

Bill of Exceptions.

Filed Oct. 29, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50008.

ANNE SWEENEY, Plaintiff,
vs.
WILLIAM G. ERVING, Defendant.

Be it remembered That at the trial of this cause begun on the 2nd day of February, A. D. 1909, and continuing thereafter
6 from day to day until and ending on the 9th day of February, A. D. 1909, before the Honorable Wendell P. Stafford, one of the Associate Justices of this Court and a jury the plaintiff, to maintain the issues on her part joined, adduced evidence tending to prove that during the Winter and Spring of 1905, Dr. James Kerr, a surgeon, was treating the plaintiff for fracture of a rib which fracture she claimed was caused by the negligence of a railway company on February 22, 1905; that the company opposed to her claim a denial that such fracture existed and at the request of the company she submitted in April, 1905, to an Xray diagnosis by Dr. Grey, a specialist in that line, but his diagnosis and the radiograph made by him failed to disclose a fracture; that thereupon Dr. Kerr arranged with the defendant, Dr. Erving, of the City of Washington, D. C., a specialist in the use of the Xray for diagnostic purposes for an Xray diagnosis by the latter by picture or radiograph as to whether or not such fracture had occurred; that in pursuance of said arrangement she went four times to the defendant's office, the first time, May 21, 1905, at the request of Dr. Kerr and each of the three subsequent times at the request of the defendant who wholly failed to obtain a satisfactory picture or radiograph, although at each of the four visits he subjected her to several exposures to the Xray in his efforts; that on her first visit, before any exposure, she told defendant that her employer Baron Moncheur, had told her the Xray was dangerous, in reply to which the defendant told her there was no more danger to her than to himself, and the defendant's wife, who was his assistant in his Xray work, and who was then present, then said to the plaintiff that the defendant and his wife had never had an accident in all their experience and had no more reason to have one then than in the thousand and more exposures previously made by them; that plaintiff felt no bad effects from the operation by Dr. Grey nor from the operations by the defendant until her fourth visit; that the exposures to which defendant subjected her were, twice at the first visit, twice at the second visit three times at the third and four times at the fourth visit, that during one of the exposures at the fourth visit on May 30, 1905, she felt bad effects and as if she would faint and told him to stop; that this

occurred about 5 o'clock P. M. and about 10 o'clock that night her back which was the portion exposed to the Xray in all the operations by the defendant, was red and itchy; that in the operation by Dr. Grey the front part of her body was exposed to the Xray; that about two weeks after the said fourth visit, finding her back was burned and the injury developing, she went again to the defendant and informed him of it, and he was the first physician who saw it; and that he treated the burn from that time until he left the city about June 30, 1905; that since then though treated by other physicians and in hospitals the injury has not been cured and in consequence of the injury she has not been able to work; that the injury is an Xray burn and caused and continues to cause the plaintiff much suffering. And thereupon the plaintiff rested.

Thereupon the defendant, by his attorney, moved the
7 court to instruct the jury to return a verdict for the defendant, but the court overruled the motion.

Thereupon the defendant to maintain the issues on his part joined adduced evidence tending to prove that his wife who was present, as was testified to by the plaintiff at the time she first came to his office, was a duly qualified physician admitted to practice as such; that both the defendant and his wife had had long experience in the use of the X-ray machine; that the machine to which the plaintiff was exposed by the defendant was an excellent machine, in good condition at the time the plaintiff was subject- to exposure in connection with it; that on the plaintiff's first visit, she was told by the defendant's wife, in the hearing of the defendant, that while both she and her husband, the defendant, had subjected many persons to X-ray exposures and had never had any ill-results, it was impossible by the use of any degree of care to prevent occasional X-ray burns from the use of the X-ray apparatus; that at none of the visits of the plaintiff to the office of the defendant for the purpose of being exposed to the X-ray apparatus did she make any complaint of any ill-effects from the exposure; and that her first complaint to him was made about seventeen days after the last exposure, when she came to the defendant's office and told him that her back was sore, whereupon the defendant requested her to return the next day, but that she did not return for ten days.

And the defendant himself in his testimony stated fully and in detail the character of his machine and the manner in which it has been used at each of the plaintiff's visits, and the length of each exposure, and the result thereof.

Thereupon the defendant examined as witnesses in his behalf six other witnesses, who testified that they had been practicing physicians in the District of Columbia for a number of years, and each of them testified that he was acquainted with the literature of the X-ray apparatus and its use, and had themselves had a great deal of practical experience with such apparatus some in the healing of diseases by it and some in the taking of radiograph pictures by the X-ray process and some in both. Each of these witnesses was informed as to the substance of the defendant's testimony as to the character of his X-ray apparatus, and the manner in which it was

used upon the plaintiff, and the duration of the several exposures to which she was subjected, and each of them testified that the machine was a good one of its kind and that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X-ray operators, and that according to their experience and reading it was safe as exposures to the X-ray apparatus could be made. And each of such witnesses further testified according to his experience and reading it is not possible in the use of the X-ray apparatus to guard absolutely against a resultant burn—that it was analogous to the use of chloroform from which death sometimes results no matter what degree of care may be exercised in its use.

8 And thereupon the defendant rested and no further testimony was adduced by either party.

And thereupon the defendant by his attorney moved the court to instruct the jury to return a verdict for the defendant but the court overruled the motion.

And thereupon the plaintiff by her attorney moved the court to instruct the jury as follows:

"If you believe upon the evidence that in the course of the operation of the X-ray apparatus by the defendant the plaintiff was burned, that fact, if you so believe it to be a fact, is of itself evidence of negligence on his part and thus casts upon him the burden of proving, if he can, by a preponderance of evidence, that the plaintiff's injury was not caused, in whole or in part by his negligence and in such case, unless you find by a preponderance of the evidence that said injury was not caused in whole or in part by the defendant's negligence, your verdict should be for the plaintiff." But the Court overruled said motion; to which ruling of the court the plaintiff by her attorney, then and there duly excepted and said exception was then noted by the Justice in his minutes.

Thereupon the plaintiff, by her attorney, moved the Court to instruct the jury as follows:

"If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill enabling him to operate it with the utmost degree of safety there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation and that such possibility was known to the defendant or by proper inquiry or study should have been known to him, it was his duty to inform the plaintiff of such possibility before he operated upon her, and if you further believe upon the evidence that he failed to perform such duty or that in the performance of the operation he failed to exercise the skill and care required of him as such operator and that the plaintiff was thereby injured, your verdict should be for the plaintiff." But the Court overruled said motion; to which ruling of the court the plaintiff, by her attorney, then and there duly excepted and said exception was then duly noted by the Justice in his minutes.

Thereupon the defendant, by his attorney, moved the court to instruct the jury as follows:

"The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray." To which motion and instruction the plaintiff by her attorney then and there duly objected; but the court overruled said objection and allowed said instruction and instructed the jury accordingly; to which ruling the plaintiff by her attorney then and there duly excepted and said exception was then duly noted by the Justice in his minutes.

9 Thereupon the defendant, by his attorney, moved the court to instruct the jury as follows:

"Even if the jury find from the evidence that the defendant in exposing the plaintiff to the X-rays committed an error of judgment either in the manner or time of exposure or both, and the plaintiff's back was burned in consequence of such error of judgment on the part of the defendant, he cannot be held liable in this action unless the jury are further satisfied by a fair preponderance of the evidence that such error of judgment was the result of the failure of the defendant to exercise reasonable care in reaching a conclusion as to the time or manner, or both, of such exposure." To which motion and instruction the plaintiff by her attorney then and there duly objected; whereupon the court modified said instruction by inserting therein the word "solely" next after the word "burned" and as thus modified granted said instruction.

Thereupon the defendant, by his attorney, moved the court to instruct the jury as follows:

"Even if the jury should be satisfied by the evidence that before the plaintiff was exposed by the defendant to the X-rays, he informed her that she would be in no more danger from such exposure than the operator and that she understood that statement to mean that there was no danger, the defendant cannot be held liable in this action for such statement, because the action is based upon a charge of negligence, and not upon a contract." To which motion and instruction the plaintiff, by her attorney, then and there objected; whereupon the court modified said instruction by inserting therein the word "merely" next after the word "action" where it first occurs therein, and as thus modified granted said instruction.

And thereupon the court charged the jury as follows: "Gentlemen of the jury: The instructions which have been granted upon each side in this case lay down pretty substantially the law which pertains to it. The plaintiff has read the instructions granted at her request; but the defendant has not made the request that was granted upon the side of the defendant. Before I have finished, perhaps I will read those instructions upon both sides, and comment somewhat upon them.

This case is what is called an action for negligence. It is not an action upon a contract. You will understand the difference by

an illustration. Suppose Miss Sweeney had brought an action against Dr. Erving, and set out in her declaration that she went there to have an X-ray picture taken, and that he guaranteed to her there was no danger connected with it; that she had the picture taken and received the burn in course of it, and therefore she claims damages. That would be an action of contract and she would be suing him because there was a breach of his contract. This is not that sort of an action. This action is brought on the theory that in undertaking to use this process he was bound to use due care, and that he failed to use due care, and by reason thereof she received this burn and injury.

There was a piece of evidence that has been commented upon on both sides, and I will allude to it right away. She testified, you will remember, that she told the Doctor she understood there was danger of getting burned in having an X-ray picture taken, and she says he told her there was no more danger to her than to him, and where he stood he admits there was no danger whatever to him. She claims to have understood from that, that the matter was free from danger to her.

Now, if you find from all the evidence in the case that he did say that, it is not a contract, because she has not brought suit in contract; but it would be an admission by him, as an expert, that the process was free from danger to the patient, if due care was exercised on the part of the operator; and you would have a right to treat that as a piece of evidence, as an admission by him to that effect, to be weighed in connection with all the other evidence in the case not as necessarily controlling or decisive in the case, but simply as one piece of evidence to be weighed in connection with all the other evidence in the case bearing on the question of whether there is some risk incidental to the process even where due care is exercised.

The burden is always upon a party going forward in a case. Here the plaintiff goes forward, and the burden is upon her. She alleges, in her declaration, that the defendant was negligent, and that this injury resulted to her by reason of that negligence. Consequently the burden is upon her to prove those two things, first, that he was negligent, and, then, second, that the injury resulted from it.

She of course is not an expert in this matter, but she took the stand and testified to what she claimed occurred after what was said. She had a right to have introduced expert testimony to supplement her own testimony as to the science and art, from which you might infer that if she received a burn it must have been and probably was the result of negligence in the operator; but she did not introduce expert witnesses in her part of the case. They have come in response to the defendant's request or protest. It makes no difference which side produces a witness. The evidence is in the case, and if it makes for the plaintiff, you are to weigh it in her favor, whether the witness is produced by her or by the defendant; and likewise, on the other side, if any evidence that is produced on behalf of the plaintiff here, helps the defendant, that is to be treated as the defendant's evidence.

So that, in determining this question whether the plaintiff has produced a balance of evidence, it does not make any difference whether the evidence comes from the mouths of her witnesses, so-called, or from the mouths of the defendant's witnesses. The question is, which side of the case does it tend to support.

But when you take all the evidence together, it is necessary, in order for her to recover that it should make a fair balance upon her side of the case. It must fairly tip the beam in her direction. In reviewing all the evidence it must be such that you are inclined to believe that the injury was the result of the defendant's negligence, rather than to believe that it was not. If it does produce that opinion and belief in your mind, then she has made out the
11 burden. If it fails to do so, she has failed in her attempt to make out a case.

The first instruction prepared by the plaintiff is not objected to by the defendant. Both parties agree that it is a fair statement of the law, and it is granted. I will read it to you.

"If you believe upon the evidence that on and before May 30th, 1905, the defendant held himself out to the public as a physician and also as a specialist in the use of the X-ray apparatus and he then undertook, either gratuitously or under employment by the plaintiff, to use said apparatus in an effort to ascertain whether or not she had sustained a fracture of one of her ribs, it was then his duty to have and to exercise in such undertaking that special degree of skill and knowledge then possessed by other physicians who were specialists in the use of such apparatus at that time; and if you further find upon the evidence that in the use of said apparatus in the performance of his undertaking aforesaid he did not possess or that he failed to exercise skill or knowledge in the special degree above stated or if he had such skill or knowledge but failed to exercise a reasonable degree of care and that in consequence thereof the plaintiff sustained the burn and injury shown in the evidence, your verdict should be for the plaintiff."

I have granted the third request presented by the plaintiff, which reads as follows:

"If you believe upon the evidence that the X-ray apparatus used by the defendant on the plaintiff was a dangerous agency, that fact, if it be a fact, imposed upon the defendant in the use of it, the duty to exercise a greater degree of care and to possess a greater degree of skill and knowledge than would be required in the use of a less dangerous agency; the degree of care, skill and knowledge required being in proportion to the danger incurred in the use."

The rule is that he was bound to have reasonable skill and to exercise reasonable care, and what is reasonable depends upon the circumstances and, among other things, it depends upon the danger attending the process or operation. That is all that means. In considering whether he was reasonable in the care and skill he possessed and used, you are to consider whether it was dangerous, and how far it was dangerous, as shown by the evidence.

Of course the matter of X-ray treatment and the use of the X-ray in taking pictures is a matter of special skill and knowledge. Ordi-

narily men know nothing about it. It is a proper subject matter for expert testimony. If you had such a question as this to determine in private life, you certainly would consult someone who knew about it, and the law permits that thing to be done in the court room just as you would do it in your private affairs. Experts are brought in to tell what they know about the subject, as it bears upon the question before you, and to give you their opinions. Their opinions are evidence; like all other evidence that evidence is to be weighed by you in your common sense, your judgment of affairs, and your experience in life; and if the testimony of an expert requires
12 correction by the application of common sense and common judgment, in the ordinary experience of life, it is for the jury to make the necessary corrections. So far as it is a matter of expert knowledge as to which you know nothing except what you hear from the experts, of course the only way for you to do is to follow the evidence. You would not have a right to conjecture or guess that it was something different from what the evidence in the case tended to show it was, because in this case, as in every other case, you are bound to find your verdict upon the evidence.

I have granted the fifth request for the plaintiff bearing upon this question, which reads as follows:

"In considering the testimony of witnesses who testify as experts you are not bound by their opinions, so far as they depend on facts from which ordinary men are competent to draw conclusions but will give to such opinions such weight as you believe, upon the evidence, they are entitled to when taken together with all other evidence in the case, and in determining the relative value of the testimony of such witnesses you will consider whatever you believe, upon the evidence, to be their professional knowledge and experience, bias and freedom from bias and the reasons they give for their conclusions."

I also give you the seventh instruction as presented by the plaintiff which reads as follows:

"If you believe the testimony or any part of the testimony of any of the witnesses to be untrue, you should reject such part from further consideration. In determining the truth or untruth of testimony, or the weight to which it is entitled you may consider, in the light of your own personal experience knowledge and observation, the inherent probability or improbability of the testimony in question, the manner and bearing of the witness while on the witness stand, and whatever appears in evidence, if anything, to indicate whether or not the witness is biased or prejudiced for or against either party to this suit, or directly or indirectly interested in this suit or its outcome, and if you believe that any of the witnesses has knowingly testified falsely as to any one material fact you have the right to reject the entire testimony of such witness as unworthy of belief."

No objection is made to that instruction.

I have granted the first of the defendant's prayers, which reads as follows:

"The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the

burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the Xray."

Also the second for the defendant, which reads as follows:

"If the defendant when he on the several occasions, exposed the plaintiff to the Xray possessed the ordinary skill, and used the ordinary care had and used by the members of the medical profession generally accustomed to such work, then he cannot be held to liability in this action, and the jury are instructed that their verdict should be for the defendant."

13 Perhaps it is proper for me to say here further upon that subject, that the law does not require the highest possible degree of care and skill of the defendant; but it requires just what is stated here, the skill ordinarily possessed by doctors doing that sort of work, and reasonable and ordinary care in view of the circumstances and risk.

The third is also granted:

"Even if the jury find from the evidence that the defendant in exposing the plaintiff to the Xrays committed an error of judgment either in the manner or time of the exposure or both, and the plaintiff's back was burned solely in consequence of such error of judgment on the part of the defendant, he cannot be held liable in this action unless the jury are further satisfied by a fair preponderance of the evidence that such error of judgment was the result of the failure of the defendant to exercise reasonable care in reaching a conclusion as to the time or manner, or both, of such exposure."

He would not be responsible for an honest mistake, unless he was careless in coming to that conclusion. You must find carelessness or want of skill. Of course if his error of judgment was due to his want of the degree of skill which the law required him to have, then he might be liable.

The fourth prayer of the defendant is granted and reads as follows:

"Even if the jury should be satisfied by the evidence that before the plaintiff was exposed by the defendant to the Xrays, he informed her that she would be in no more danger from such exposure than the operator, and she understood that statement to mean that there was no danger, the defendant cannot be held liable in this action merely for such statement because the action is based upon a charge of negligence and not upon a contract."

This is the same matter I spoke of to you in the beginning of the charge.

The plaintiff has presented a request with reference to damages, which I have granted. It is number six, and reads as follows:

"If you return a verdict for the plaintiff you should award to her therein such sum as you believe upon the evidence to be reasonable compensation to her for the injury sustained by her in consequence of the acts of the defendant on which your verdict is based in accordance with the instructions given you by the Court, including as matters for such compensation whatever, if any, expenses she has paid or incurred and may reasonably be expected hereafter to incur

in and about her reasonable efforts to effect a cure of said injury, and also whatever, if any, bodily pain and mental suffering she has endured and may reasonably be expected hereafter to endure in consequence of said injury, and whatever if any, impairment or loss she has suffered and may reasonably be expected hereafter to suffer in her ability to earn money in consequence of such injury."

I think that covers the various elements of damage. The mental suffering must be something immediately connected with the injury, as one may suffer in mind as well as in body from a wound;
14 but it does not mean shame or humiliation by reason of having a scar. This scar is where it is concealed and of course it is not like a disfigurement upon the face, so that element would not exist, in such a case as this.

You will have to determine, in the first place, what did really happen when these exposures were being made. I am not going to review the evidence. I think I had better not refer to it. It is all in your hands, and it is for you to determine just what did occur, how the exposure was made, and what happened. It is for you to determine that question upon the evidence, and only upon the evidence before you.

Then when you have made up your minds how it did occur, what was done and what was not done, you will decide whether the burn which it is admitted resulted from the exposure came about by reason of any want of skill or care such as I have described here as necessary on the part of the defendant. If it was not due to that, then he is not liable; and upon that question the burden is upon the plaintiff.

If you find, by the fair preponderance of all the testimony, that it was the result of his carelessness, as charged, then you will take up the question of damages; and the plaintiff will be entitled to recover such a sum as, in your judgment, would make her whole, taking into consideration the various elements set out in the instruction which I have granted for the plaintiff.

Mr. BAILEY, Attorney for plaintiff: "If the Court please, I understand the practice requires a renewing of our exceptions to the charge before the jury retires."

The COURT: I have minuted the exceptions to the refusal of your requests so far as they are refused, and to the granting of the defendant's requests so far as they were objected to by you, and the exceptions are of record."

Mr. BAILEY: I also beg leave to ask your Honor to note an exception to so much of the charge as relates to the burden of proof and the doctrine of res ipsa loquitur."

The COURT: Yes.

(The said exception was then duly noted by the Justice in his minutes.)

Mr. WORTHINGTON, Attorney for defendant: "I arise, in the first place rather to call your Honor's attention to what I think is a mistake of your Honor's than for the purpose of noting an exception. Your Honor just said the burn which it was admitted resulted from the exposures. It is not disputed that this is an Xray burn, but it

is not admitted it was caused by the exposure that Dr. Erving submitted her to. We claim the evidence leaves it uncertain whether it resulted from that or from the exposure that Dr. Grey submitted her to. All the witnesses for the defendant have testified that the burn might appear several weeks or months afterwards."

The COURT: I will make that correction. It is a proper correction to be made. I did not intend to state it quite as I did. What I mean is this: I do not understand it to be admitted and have not understood, at any time, that it was admitted by the defendant that this burn resulted from this treatment of the plaintiff. That will be a matter of fact to be found by you, but I did understand it to be admitted that it was an Xray burn."

Mr. WORTHINGTON: Yes; we all understand that."

Mr. BAILEY: "Dr. Grey said that the exposure he made was on the front part of the body."

The COURT: "Miss Sweeney also testified as to where the exposure was on her body; but that is for the jury."

Mr. WORTHINGTON: "I would like to save the point, for the present. You held that if the jury should believe that the plaintiff says she was told there was no more danger to her than to the operator, it was an admission which the jury could take along with other evidence, bearing upon the question of whether the process was free from danger. I want an exception to that on the ground that upon the whole evidence in this case I would say the Court would have to tell the jury that the unmistakable evidence in the case is that there is some danger and that they could not possibly, on the evidence reach any other conclusion; in other words it has reference to the scintilla doctrine."

The COURT: "I have noted that exception so as to have that point saved to you."

And thereupon by direction of said Justice the jury retired to consider of their verdict and thereafter on the same day, the 9th day of February A. D. 1909, the jury returned a verdict for the defendant, upon which verdict, judgment for the defendant was entered on the 18th day of June, A. D. 1909, and thereafter the plaintiff by her attorney duly presented and submitted the foregoing bill of exceptions and prayed the court to settle and sign the same and cause the same to be entered of record, which is accordingly done nunc pro tunc this 29th day of October, A. D., 1909.

WENDELL P. STAFFORD, *Justice.*

The defendant will take notice that at 10 o'clock A. M. on the 14th day of September, A. D. — or as soon thereafter as counsel may be heard, the plaintiff will present to the court and move the court to settle, sign and enter of record, a bill of exceptions in the above entitled suit, of which proposed bill of exceptions the foregoing is a copy.

LORENZO A. BAILEY,
Attorney for Plaintiff.

COPY

SEPT. 2, 1909.

Service of the foregoing notice and of a copy of the proposed bill of exceptions therein mentioned is hereby acknowledged this 2nd day of September, A. D., 1909.

CHARLES L. FRAILEY,
Of Counsel for Defendant.

16 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Nov. 12, 1909.

At Law. No. 50008.

ANNE SWEENEY, Plaintiff,
v.
WILLIAM G. ERVING, Defendant.

The Clerk will please prepare the transcript of record on appeal, including declaration, plea, joinder in issue, memo. of verdict, judgment, entry showing appeal noted in open court, memo. showing appeal bond filed, orders extending time, bill of exceptions and this order, omitting repetition of title of cause.

LORENZO A. BAILEY,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50008 at Law, wherein Anne Sweeney is Plaintiff and William G. Erving is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of November, 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2094. Anne E. Sweeney, appellant, vs. William G. Erving. Court of Appeals, District of Columbia. Filed Nov. 26, 1909. Henry W. Hodges, Clerk.

17 No. 2094.

ANNE SWEENEY, Appellant,
vs.
WILLIAM G. ERVING.

WEDNESDAY, *March 2d*, A. D. 1910.

The argument in the above entitled cause was commenced by Mr. L. A. Bailey, attorney for the appellant, and was continued by Mr. C. L. Frailey, attorney for the appellee, and was concluded by Mr. L. A. Bailey, attorney for the appellant.

18 In the Court of Appeals of the District of Columbia.

No. 2094.

ANNE SWEENEY, Appellant,
vs.
WM. G. ERVING.

Opinion.

(Mr. Justice Robb delivered the opinion of the Court.)

Appeal from a judgment of the Supreme Court of the District of Columbia upon a verdict for the defendant in an action in case against a physician for negligence and unskillfulness in applying X-rays to the back of plaintiff, appellant here.

To the plaintiff's declaration the defendant pleaded the general issue. At the trial the plaintiff's evidence was substantially as follows: During the winter and spring of 1905 Dr. James Kerr, a surgeon, was treating plaintiff for a fractured rib, which injury she claimed was produced by the negligence of a railroad company in Feb., 1905. The company denied the existence of such fracture and, at its request, she submitted, in April, 1905, to an X-ray diagnosis, by Dr. Grey, an X-ray specialist. This diagnosis and the radiograph then made failed to disclose a fracture. Thereupon Dr. Kerr, representing plaintiff, arranged with the defendant, Dr. Erving of this city, for another diagnosis by X-ray. Thereupon plaintiff visited defendant's office four times, the first time on May 21st, 1905. Each of the subsequent visits she made at the request of the defendant. Upon the first visit there were two exposures, upon the second two, upon the third three and upon the fourth three. According to plaintiff's testimony none of these exposures resulted in a satisfactory radiograph. She further testified that before the first exposure she informed defendant that her employer "had told her the X-ray was dangerous, in reply to which the defendant told her
19 there was no more danger to her than to himself, and the defendant's wife, who was his assistant in his X-ray work, and who was then present, then said to the plaintiff that the defendant and his wife had never had an accident in all their ex-

perience and had no more reason to have one then than in the thousand and more exposures previously made by them." Plaintiff felt no bad effects from the operation by Dr. Grey, or from the operation by defendant until her fourth visit when, during one of the exposures, she felt faint and directed defendant to stop. At about ten o'clock that night her back which was the part exposed in all the operations by defendant, was red and itchy. About two weeks thereafter, finding her back burned and injury developing, she again went to the defendant and he was the first physician to examine the injury. He continued to treat the burn from that time until June 30th, 1905, when he left the city. Subsequently plaintiff had been treated by other physicians and in hospitals but the injury had not been cured and still continued to cause her much suffering and to incapacitate her for work. Here plaintiff rested and defendant moved for a verdict, which motion the court overruled.

The evidence of the defendant was to the effect that his wife was a duly qualified physician and that both he and his wife had had long experience in the use of the X-ray machine; that the machine to which plaintiff was exposed was an excellent one and in good condition at the time of the exposures; that on the plaintiff's first visit she was told by the defendant's wife in his hearing "that while both she and her husband, the defendant, had subjected many persons to X-ray exposures and had never had any ill results, it was impossible by the use of any degree of care to prevent occasional X-ray burns from the use of the X-ray apparatus"; that plaintiff's first complaint was made about seventeen days after, and not at, the last exposure; that when this complaint was made defendant requested plaintiff to return the next day but that she did not return for ten days. The defendant introduced in his behalf six practicing physicians of the District "and each of them testified that he was
20 acquainted with the literature of the X-ray apparatus and its use, and had themselves had a great deal of practical experience with such apparatus some in the healing of diseases by it and some in the taking of radiograph pictures by the X-ray process and some in both. Each of these witnesses was informed as to the substance of the defendant's testimony as to the character of his X-ray apparatus, and the manner in which it was used upon the plaintiff, and the duration of the several exposures to which she was subjected, and each of them testified that the machine was a good one of its kind and that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X-ray operators, and that according to their experience and reading it was safe as exposures to the X-ray apparatus could be made."

The plaintiff introduced no testimony in rebuttal and the defendant again moved for a verdict, which motion was again denied. This case comes here on errors assigned upon the refusal of certain of plaintiff's instructions and the granting of certain of defendant's.

1. The Court declined to rule that the fact that the plaintiff was burned in the course of the operation of the X-ray apparatus by the defendant, if the jury should find that fact to be established, was of

itself evidence of negligence on the part of the defendant and imposed upon him the burden of proving by a preponderance of the evidence that the plaintiff's injury was not caused in whole or in part by his negligence, and granted the following prayer of the defendant: "The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure to the X-ray."

It is well settled that the degree of skill and learning which a physician or surgeon is required to possess and exercise is that degree of skill and learning ordinarily possessed and exercised
21 by members of his profession in the same line of practice in that locality. Sheldon vs. Wright, 80 Vt. 298; State vs. Housekeeper, 70 Md. 162; McDonald vs. Harris, 131 Ala. 359; Pike vs. Honsinger, 155 N. Y. 201; Ely vs. Wilber, 49 N. J. L. 685; Boon vs. Murphy, 108 N. C. 187; Such also is the rule applied to those practicing Osteopathy. Wilkins vs. Brock, 81 Vt. 332, 70 At. Rep. 572. The same rule applies to veterinary surgeons. Barney vs. Pinkham, 29 Nebr. 350.

In Henslin vs. Wheaton, 91 Minn. 219, which was an action against a physician for negligence and unskillfulness in operating an X-ray apparatus whereby plaintiff was injured, it was held that the rule of liability in such a case is the same as that applied in other actions for malpractice, namely, "such reasonable care and skill as is usually given by physicians and surgeons in good standing." In that case the purpose of the application of the X-ray was to locate a foreign substance thought to be in plaintiff's lungs.

Generally speaking, no inference of negligence can be drawn from the result of the treatment of a physician or surgeon. In the absence of special contract they are not insurers and there must be evidence of negligence by witnesses qualified to testify. Wood vs. Barker, 49 Mich. 295; Piles vs. Hughes, 10 Iowa 579. "If the maxim 'Res Ipsa Loquitur' were applicable to a case like this and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art for they would have to assume financial liability for nearly all 'the ills that flesh is heir to'". Ewing vs. Goode, 78 Fed. 442.

There are exceptional cases where the result of an operation performed, if unexplained, may warrant an inference of negligence. Thus evidence showing that after a broken ankle was reset the ankle was crooked and the ankle joint stiff tends to prove negligence on the part of the physician in setting the ankle, which evidence
22 should be submitted to the jury. Hickman vs. Neeley, 54 S. W. 842. The fact that a physician attending a woman at child birth failed to remove all the placenta justifies, if unexplained, a conclusion of negligence. Maratsky vs. Worth, 67 Minn. 46.

The result of the above general rule is that in an action for malpractice the burden is always on the one alleging it, and even in exceptional cases where a prima facie case is made out by proof of the

operation and resultant injury "the doctrine of Res Ipsa Loquitur does not relieve plaintiff of the burden imposed upon him of establishing his case by a preponderance of the evidence." Sullivan vs. The Capital Traction Co., present term, 38 Washington Law Rep. 74. When the defendant held himself out to the public as qualified in the use of the X-ray for the treatment and diagnosis of ailments the law implied on his part the promise and duty to exercise reasonable skill and care in such use. In other words, that he would bring to bear in this particular branch of the profession the same degree of skill and care required of physicians and surgeons in other branches of the profession. In the absence of the defendant's alleged statement to the plaintiff that "there was no more danger to her than to himself" it would have been the duty of the court to have granted defendant's request at the close of plaintiff's evidence for a directed verdict, for, in the absence of that statement, there would have been no evidence of negligence. In Wilkins vs. Brock, 81 Vt. 332, supra, the court said: "The defendant Brock's motion for a verdict should have been sustained, for to warrant the finding of malpractice it was necessary to have expert medical testimony to show it, and there was none; but, on the contrary, there was such testimony tending to show that the treatment was proper, and according to the principles and practice of osteopathy. It was not enough to show merely that the treatment was injurious, but it was necessary to go further, and to show by competent witnesses that the requisite care and skill was not exercised—for that was
22 the only question, according to the plaintiff's brief—and that was not done. Such is the doctrine of all cases."

Here there was no testimony that the instrument used by the defendant was out of repair, that the exposures were of too frequent periods or of too great duration. Neither is there any evidence of lack of skill. On the contrary, the defendant testified to his long experience in the use of such a machine, to the condition of the machine, and to the exact character of its use upon the plaintiff. In addition to this testimony he introduced six physicians skilled in that particular branch of practice, whose testimony, without exception, negatived the charge of negligence. In that state of the case the plaintiff received all, and possibly more than, the consideration to which she was entitled by being permitted to go to the jury at all.

Shocklee vs. Tucker, 127 Iowa 450, was an action against a physician for negligence in the use of the X-rays in the treatment of appendicitis and negligence in the application of the remedy. The court, "without elaborating the questions presented," ruled that the fact that the plaintiff sustained an X-ray burn was of itself evidence of improper treatment. This conclusion is, we think, in conflict with the rule of other jurisdictions. The evidence in this record justifies the finding that the use of the X-ray in the diagnosis and treatment of human ills is recognized and practiced by the medical profession. Such being the case, we see no reason why a different rule should apply to practitioners in this line than is applied to

other practitioners. There was no error, therefore, in refusing plaintiff's instruction and in granting the defendant's.

2. The only other assignment necessary to be noticed is based upon the refusal of the court to grant the following prayer: "If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill enabling him to operate it
24 with the utmost degree of safety there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation and that such possibility was known to the defendant or by proper study or inquiry should have been known to him, it was his duty to inform the plaintiff of such possibility before he operated upon her, and if you further believe upon the evidence that he failed to perform such duty or that in the performance of the operation he failed to exercise the skill and care required of him as such operator and that the plaintiff was thereby injured, your verdict should be for the plaintiff." There are at least two objections to this prayer, either of which would have justified its rejection. While it is a general rule that it is incumbent upon a physician properly to inform himself of the condition of his patient that he may intelligently exercise the skill of his calling,—Staloch vs. Holm, 100 Minn. 276,—there is nothing in the record to justify the inference that the condition of the plaintiff, when the defendant subjected her to X-ray exposures, was such as to render her peculiarly liable to injury. Having been under treatment by a surgeon of recognized ability and having been sent to the defendant by such surgeon, for the purpose named, we think the defendant, in the absence of anything warranting a contrary conclusion, was justified in relying upon the judgment of the surgeon.

Finding no error the judgment must be affirmed with costs. Affirmed.

25 No. 2094, April Term, 1910.

ANNE SWEENEY, Appellant,
vs.
WILLIAM G. ERVING.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, *April 5th, A. D.* 1910.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed, with costs.

Per MR. JUSTICE ROBB,
April 5, 1910.

26 No. 2094.

ANNE SWEENEY, Appellant,
vs.
WILLIAM G. ERVING.

WEDNESDAY, *April 13th, A. D.* 1910.

On motion of Mr. L. A. Bailey, attorney for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Anne Sweeney, Appellant, and William G. Erving, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
—— ——.

28 (*Bond on Writ of Error.*)

Know all men by these presents, That we, Anne Sweeney, as principal, and The United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto William G. Erving in the full and just sum of three hundred # dollars to be paid to the said William G. Erving, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves,

our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 19th day of April, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Anne Sweeney and the said William G. Erving, and in the dockets of said Court numbered 2904 a judgment was rendered against the said Anne Sweeney and the said Anne Sweeney having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William G. Erving citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Anne Sweeney shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

ANNE SWEENEY. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By GEORGE O'DONNELL, [SEAL.]
Attorney in Fact.

[Seal of The United States Fidelity & Guaranty Co.]

Sealed and delivered in the presence of—
GERALD D. FARRELL, JR.

This bond is satisfactory to us.
C. L. FRAILEY,
Of Counsel.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2094. Anne Sweeney, Appellant, vs. William G. Erving. Bond on Writ of Error to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Apr. 23, 1910. Henry W. Hodges, Clerk.

29 UNITED STATES OF AMERICA, *ss:*

To William G. Erving, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Anne Sweeney is plaintiff in error, and you are defendant in error,

to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 23rd day of April, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted April 23, 1910.

A. S. WORTHINGTON,
Counsel for Wm. G. Erving.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 23, 1910. Henry W. Hodges, Clerk.

30 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 29 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Anne Sweeney, Appellant, vs. William G. Erving, No. 2094, April Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of April A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

31 In the Supreme Court of the United States, October Term, 1911.

No. 296.

ANNE SWEENEY, Plaintiff in Error,
vs.
WILLIAM G. ERVING.

Assignment of Errors.

The plaintiff in error, for an assignment of errors appearing on the face of the record herein, respectfully submits that the Court of Appeals of the District of Columbia, in and by its judgment affirming its judgment of the trial court in this suit, erred to the prejudice of the plaintiff, now plaintiff in error, as follows, viz:

1. In overruling the plaintiff's exception to the refusal by the trial court to instruct the jury as follows:

"If you believe upon the evidence that in the course of the operation of the X-ray apparatus by the defendant the plaintiff was burned, that fact, if you so believe it to be a fact, is of itself evidence of negligence on his part and thus casts upon him the burden of proving, if he can, by a preponderance of evidence, that the plaintiff's injury was not caused, in whole or part by his negligence and in such case, unless you find by a preponderance of the evidence that said injury was not caused in whole or in part by the defendant's negligence, your verdict should be for the plaintiff".

2. In overruling the plaintiff's exception to the refusal by the trial court to instruct the jury as follows:

"If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill enabling him to operate it with the utmost degree of safety there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation and that such possibility was known to the defendant or by proper inquiry or study should have been known to him, it was his duty to inform the
32 plaintiff of such possibility before he operated upon her, and if you further believe upon the evidence that he failed to perform such duty or that in the performance of the operation he failed to exercise the skill and care required of him as such operator and that the plaintiff was thereby injured, your verdict should be for the plaintiff".

3. In overruling the plaintiff's exception to the action of the trial court in granting and in giving to the jury the following instruction, viz:

"The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray".

4. In overruling the plaintiff's exception to so much of the charge of the trial court to the jury as relates to the burden of proof and the doctrine of res ipsa loquitur, the same being in words as follows:

"The burden is always upon a party going forward in a case. Here the plaintiff goes forward, and the burden is upon her. She alleges, in her declaration, that the defendant was negligent, and that this injury resulted to her by reason of that negligence. Consequently the burden is upon her to prove those two things, first, that he was negligent, and then, second, that the injury resulted from it."

"But when you take all the evidence together, it is necessary, in order for her to recover that it should make a fair balance upon her side of the case. It must fairly tip the beam in her direction. In reviewing all the evidence it must be such that you are inclined to believe that the injury was the result of the defendant's negligence,

rather than to believe that it was not. If it does produce that opinion and belief in your mind, then she has made out the burden. If it fails to do so, she has failed in her attempt to make out a case."

"The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray".

"You will have to determine, in the first place, what did really happen when these exposures were being made. * * * Then when you have made up your minds how it did occur, what was done and what was not done, you will decide whether the burn" * * * "came about by reason of any want of skill or care such as I have described here as necessary on the part of the defendant. If it was not due to that, then he is not liable; and upon that question the burden is upon the plaintiff."

33 These portions of the charge being also made still more injurious to the plaintiff by reason of specific mention in the charge of the fact that although she had a right to introduce expert witnesses she did not do so, but that "they have come in response to the defendant's request", and this further language in the charge:

"Of course the matter of X-ray treatment and the use of the X-ray in taking pictures is a matter of special skill and knowledge. Ordinarily men know nothing about it. It is a proper subject matter for expert testimony. If you had such a question as this to determine in private life, you certainly would consult some one who knew about it, and the law permits that thing to be done in the court room just as you would do it in your private affairs." * * * "So far as it is a matter of expert knowledge as to which you know nothing except what you hear from the experts, of course the only way for you to do is to follow the evidence. You would not have a right to conjecture or guess that it was something different from what the evidence in the case tended to show it was."

5. In holding, as set forth in its opinion, that the defendant in this case, who was not employed as a physician but was merely employed to make a picture by means of the X-ray apparatus, was entitled to the benefit of the general rule as to the necessity of expert testimony to sustain a charge of malpractice against a physician or surgeon.

LORENZO A. BAILEY,
Counsel for Plaintiff in Error.

34 [Endorsed:] File No. 22,191. Supreme Court U. S. October Term, 1911. Term No. 296. Anne Sweeney, Pl'ff in Error, vs. William G. Erving. Assignment of Errors. Filed February 27, 1912.

Endorsed on cover: File No. 22,191. District of Columbia Court of Appeals. Term No. 296. Anne Sweeney, plaintiff in error, vs. William G. Erving. Filed May 23d, 1910. File No. 22,191.

10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 60.

ANNE SWEENEY, *Plaintiff in Error,*

vs.

WILLIAM G. ERVING.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

LORENZO A. BAILEY,
Counsel for Plaintiff in Error.

(22,191)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 60.

ANNE SWEENEY, *Plaintiff in Error,*

vs.

WILLIAM G. ERVING.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a suit at law, instituted and tried by jury in the Supreme Court of the District of Columbia, wherein the plaintiff, now plaintiff in error, sought damages for personal injuries which she alleged were inflicted upon her by the defendant, now defendant in error, in his unskillful and negli-

gent use of his X-ray apparatus upon his undertaking to ascertain by means of the X-ray whether or not she had sustained a fracture of a rib. He pleaded the general issue upon which she joined. At the trial, after evidence adduced by each party, verdict was for defendant and judgment was entered thereon, which judgment, on appeal by plaintiff, was affirmed by the Court of Appeals of the District of Columbia and is now here for review on writ of error sued out by the plaintiff.

The questions involved are substantially as follows:

1. Was the testimony of experts essential to sustain the plaintiff's case?

2. By the evidence tending to prove that the X-Ray burn on plaintiff's back was caused by the defendant in the operation of his X-ray apparatus upon his undertaking to produce a picture showing whether or not she had sustained a fracture of a rib, had she sufficiently sustained the burden of proof so as to cast upon him the burden of proving, if he could, that the burn was not caused by his fault?

3. The defendant adduced testimony of experts tending to prove that the apparatus "was a good one of its kind and that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X-ray operators and that according to their experience and reading it was safe as exposures to the X-ray apparatus could be made;" "that it was impossible by the use of any degree of care to prevent occasional burns from the use of the X-ray apparatus;" that "it is not possible in the use of the X-ray apparatus to guard absolutely against a resultant burn—that it was analogous to the use of chloroform, from which death sometimes results, no matter what degree of care may be exercised in its use." (Rec., pp. 7, 8). Quere: Was that expert testimony sufficient defence in view of the undisputed facts in evidence that the plaintiff's injury is an X-ray burn which first became manifest

during her last exposure in the operations by the defendant and that he assured her before any exposures that "there was no more danger to her than to himself," and during the trial he admitted that where he stood during the operations "there was no danger whatever to him." (Rec., pp. 6, 10)?

These questions were raised, upon the pleadings and evidence, by the plaintiff's exceptions to certain portions of the charge of the trial court to the jury and to the action of the court in refusing the 2nd and 4th instructions to the jury prayed by the plaintiff and in granting the 1st instruction to the jury prayed by the defendant; all of which are more fully shown in the specification of errors.

The plaintiffs' case, upon the evidence contained in the bill of exceptions (Rec., p. 6), is substantially as follows: In the Spring of 1905, Dr. James Kerr, an eminent surgeon, was treating the plaintiff for fracture of a rib said to have been caused by the negligence of a railway company. Her claim against the company was met by a denial that such fracture existed. At the request of the company she submitted in April, 1905, to an X-ray diagnosis by Dr. Grey, a specialist in that line. Such diagnosis consisting merely of the making of a picture called a radiograph. The radiograph made by him failed to disclose a fracture. Thereafter Dr. Kerr arranged with the defendant, Dr. Erving, a specialist in the use of the X-ray, for the making of a radiograph by the latter to show thereby whether or not such fracture had occurred. She went four times to the defendant; the first time, May 21, 1905, at the request of Dr. Kerr and each of the three subsequent times at the request of defendant, who wholly failed to obtain a satisfactory picture, although at each of the four visits he subjected her to several exposures to the X-ray in his efforts. On her first visit, before any exposure, she told defendant that her employer, Baron Moncheur, had told her the X-ray was dangerous. Defendant replied that there was no more danger to

her than to himself and he admits that where he stood there was no danger whatever to him. (Rec., p. 10.) Defendant's wife who assisted him, was then present, and (according to her own testimony) said to the plaintiff that the defendant and his wife had never had an accident in their experience and had no more reason to have one on that occasion than in the thousand and more exposures previously made by them. Plaintiff felt no bad effects from the operation by Dr. Grey nor from the operations by the defendant until the 4th visit. The exposures to which defendant subjected her were as follows: 1st visit, twice; 2nd visit, twice; 3rd visit, three times; 4th visit, four times. During one of the exposures on the 4th visit, May 30, she felt bad effects, as if she would faint, and told him to stop. That was about five o'clock P. M. and about ten o'clock that night her back, which was the portion exposed to the X-ray was red and itchy. In the operation by Dr. Grey the front part of her body was exposed. About two weeks later finding the injury developing, she went again to the defendant and informed him of it. He was the first physician who saw it. He treated it until he left the city about June 30, 1905, and since then, though treated by other physicians, and in hospitals, the injury has not been cured and she has not been able to work. The injury is an X-ray burn and caused and continues to cause much suffering.

The defendant's case, upon the evidence (Rec., p. 7), is substantially as follows: The X-ray apparatus used by him upon the plaintiff belonged to him, was of a good make, in good condition, and was used by him upon many other persons before and since the injury to plaintiff without injury to any of them. He admits that the injury is an X-ray burn, but he cannot explain what caused it. He adduces testimony of X-ray specialists who state as experts and from personal experience, that such an injury may occur despite

the utmost care; that the element of danger is always present, owing to some idiosyncrasy of the person exposed, or of the machine, of which the operator may be wholly unable to inform himself in advance; and that in their opinion the exposures of the plaintiff in the operation by the defendant as described in his testimony, were perfectly safe.

SPECIFICATION OF ERRORS.

The Court of Appeals of the District of Columbia, in and by its judgment (Rec., p. 21), affirming the judgment of the trial court in this suit, erred to the prejudice of the plaintiff, now plaintiff in error, as follows, viz:

1. In overruling the plaintiff's exception to the refusal by the trial court to instruct the jury as prayed by the plaintiff, as follows:

> "If you believe upon the evidence that in the course of the operation of the X-ray apparatus by the defendant the plaintiff was burned, that fact, if you so believe it to be a fact, is of itself evidence of negligence on his part and thus casts upon him the burden of proving, if he can, by a preponderance of evidence, that the plaintiff's injury was not caused, in whole or in part by his negligence and in such case, unless you find by a preponderance of the evidence that said injury was not caused in whole or in part by the defendant's negligence, your verdict should be for the plaintiff." (Rec., p. 8.)

2. In overruling the plaintiff's exception to the refusal by the trial court to instruct the jury as prayed by the plaintiff as follows:

> "If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill enabling him to operate it with the utmost

degree of safety there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation and that such possibility was known to the defendant or by proper inquiry or study should have been known to him, it was his duty to inform the plaintiff of such possibility before he operated upon her, and if you further believe upon the evidence that he failed to perform such duty or that in the performance of the operation he failed to exercise the skill and care required of him as such operator and that the plaintiff was thereby injured, your verdict should be for the plaintiff." (Rec., p. 8.)

3. In overruling the plaintiff's exception to the action of the trial court in granting and in giving to the jury the following instruction, prayed by the defendant, viz:

"The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray." (Rec., p. 9.)

4. In overruling the plaintiff's exception (Rec. ,p. 14) to so much of the charge of the trial court to the jury as relates to the burden of proof and the doctrine of *res ipsa loquitur,* the same being in words as follows:

"The burden is always upon a party going forward in a case. Here the plaintiff goes forward, and the burden is upon her. She alleges, in her declaration, that the defendant was negligent, and that this injury resulted to her by reason of that negligence. Consequently the burden is upon her to prove those two things, first, that he was negligent, and then, second, that the injury resulted from it." (Rec., p. 10.)

"But when you take all the evidence together, it is necessary, in order for her to recover that it should make a fair balance upon her side of the case. It must fairly tip the beam in her direction. In reviewing all the evidence it must be such that you are inclined to believe that the injury was the result of the defendant's negligence, rather than to believe that it was not. If it does produce that opinion and belief in your mind, then she has made out the burden. If it fails to do so she has failed in her attempt to make out a case." (Rec., p. 11).

"The jury are instructed that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray." (Rec., pp. 11, 12.)

"You will have to determine, in the first place, what did really happen when these exposures were being made. * * * Then when you have made up your minds how it did occur, what was done and what was not done, you will decide whether the burn" * * * "came about by reason of any want of skill or care such as I have described here as necessary on the part of the defendant. If it was not due to that, then he is not liable; and upon that question the burden is upon the plaintiff." (Rec., p. 14.)

These portions of the charge being also made still more injurious to the plaintiff by reason of specific mention in the charge of the fact that although she had a right to introduce expert witnesses she did not do so, but that "they have come in response to the defendant's request." (Rec., p. 10), and this further language in the charge:

"Of course the matter of X-ray treatment and the use of the X-ray in taking pictures is a matter of special skill and knowledge. Ordinarily men know nothing about it. It is a proper subject-matter for expert testi-

mony. If you had such a question as this to determine in private life, you certainly would consult some one who knew about it, and the law permits that thing to be done in the court room just as you would do it in your private affairs." * * * "So far as it is a matter of expert knowledge as to which you know nothing except what you hear from the experts, of course the only way for you to do is to follow the evidence. You would not have a right to conjecture or guess that it was something different from what the evidence in the case tended to show it was." (Rec., pp. 11, 12.)

5. In holding, as set forth in its opinion, that the defendant in this case, who was not employed as a physician or surgeon, but was employed merely to make a picture by means of the X-ray apparatus, was entitled to the benefit of the general rule as to the necessity of expert testimony to sustain a charge of negligence or malpractice against a physician or surgeon (Rec., pp. 19, 20, 21.)

ARGUMENT.

I. Was expert testimony essential in order to prove negligence, as in cases against physicians and surgeons?

The Court of Appeals in its opinion (Rec., p. 20), said: "In the absence of the defendant's alleged statement to the plaintiff that 'there was no more danger to her than to himself' it would have been the duty of the court to have granted defendant's request at the close of plaintiff's evidence for a directed verdict, for, in the absence of that statement, there would have been no evidence of negligence." * * * "The evidence in this record justifies the finding that the use of the X-ray in the diagnosis and treatment of human ills is recognized and practiced by the medical profession. Such being the case, we see no reason why a different rule should apply to practitioners in this line than is applied to other

practitioners." That this was also the dominant thought in the mind of the trial judge is obvious upon reference to his rulings and his charge to the jury (Rec., pp. 10, 11, 12).

In all this the court went outside the matters alleged and proven. The plaintiff, in her second count (Rec., p. 2), which contains no statement as to defendant's occupation or profession, alleges that he undertook, "upon his own special instance and request and with the consent of the plaintiff, to make and entered upon the making of a certain X-ray test upon the plaintiff's body with a certain apparatus then in the possession and under the control of the defendant" and that she was injured in consequence of his failure to fulfill his duty to exercise due care in making said test. The evidence, uncontradicted, is that he was employed as alleged in the first count but never accomplished the purpose of his employment; that upon his failure to make a satisfactory radiograph in the two exposures made during her first visit to his office he requested her to come there again and, at his request, she made three further visits and submitted to nine further exposures and it was not until the last of these that she felt any ill effects (Rec., p. 6).

He was not originally employed, nor did he ever undertake, to perform any of the duties of a physician or surgeon. He took no part in the treatment of any disorder. His undertaking was merely to make a picture. In making the picture he burned her back. The court below holds that she is without redress unless she can show his negligence by expert testimony; for example, that the instrument he used was out of repair or that the exposures were of too frequent periods, or too great duration or that he lacked in skill; and the court states, as its grounds for this decision, that "the use of the X-ray in the diagnosis and treatment of human ills is recognized and practiced by the medical profession." (Rec., p. 20).

That conclusion is based upon a theory which was disap-

proved by this court in these words: "But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it should be coextensive with the judgment of each individual was exploded, if it needed exploding, by Chief Justice Tindal, in Vaughan *vs.* Menlove, 3 Bing. N. C., 468, 475."

Oceanic Steam Nav. Co. *vs.* Aitken, 196 U. S., 589, 596.

L *II. Res ipsa Loquitur; Burden of proof.*

The injury to plaintiff was caused by an agency in the possession of the defendant and under his exclusive management and control. From this arises the presumption of negligence on his part and the burden then devolves upon him to overcome that presumption, if he can, by evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part.

Kohner *vs.* Capital Traction Co., 22 App. D. C., 181, 187, 190.

Shockley *vs.* Tucker, 127 Iowa, 456, 458; 103 N. W., 360 (1905).

Heuslin *vs.* Wheaton, 91 Minn., 219, 222; 97 N. W., 882; 103 Am. St. Rep., 504; 64 L. R. A., 126.

Wigmore, Evid., Sec. 2509.

Hicherson *vs.* Neely, 21 Ky. L. R., 1257; 54 S. W., 842; 29 Cyc., 590; 30 Cyc., 1587.

Sauers *vs.* Smits, 95 Pac., 1097 (Wash., 1908).

Gannon *vs.* Gas Co., 145 Mo., 502; 46 S. W., 968; 47 S. W., 907; 43 L. R. A., 505.

Von Treba *vs.* Laclede Gaslight Co., 209 Mo., 648; 108 S. W., 559 (1908).

Brown *vs.* Consolidated Light, Power & Ice Co., 109 S. W., 1032 (Mo. App., 1908).

Moglia *vs.* Nassau Electric R. Co., 111 N. Y. S., 70; 127 App. Div., 243 (1908).

Gurdon & Ft. S. Ry. Co. *vs.* Calhoun, 86 Ark., 76; 109 S. W., 1017.

Mitchell *vs.* C. & A. Ry. Co., 132 Mo. App., 143, 112 S. W., 291 (1908).

Eaton *vs.* N. Y. C. & H. R. Co., 109 N. Y. S., 419, 125 App. Div., 54 (1908).

Anderson *vs.* McCarthy Dry Goods Co., 49 Wash., 398; 95 Pac., 325 (1908).

In the Kohner case, *supra*, the court said:

> "The plaintiff, as has been noted, has not specially proved negligence on the part of the defendant. He has simply proved that he was a passenger on the defendant's car, and that he was injured by the act of the conductor of that car, and the doctrine of *res ipsa loquitur* is thereupon invoked to show negligence.

The court then proceeded to consider the doctrine in the light of Benedick v. Potts, 88 Md., 52; Shearman & Redfield on Negligence, Sec. 59, and Griffen v. Manice, 166 N. Y., 188, 193, and thereupon further said:

> "It is plainly a case where the doctrine of *res ipsa loquitur* applies, and throws upon the defendant the burden of proving that there was no negligence on its part, and that the injury was the result of unavoidable accident. * * * It does not follow that, because an explanation is sufficient in law, therefore it is true; nor does it follow that, because it is true, it is sufficient to exonerate the defendant. The explanation may be true as far as it goes, and yet it may not be sufficient to overcome the presumption of negligence raised from the circumstances of the accident" (22 App. D. C., 186-190).

The principle as to burden of proof invoked by the plaintiff is fully sustained by the leading case of Stokes v. Salton-

stall, 13 Peters, 181, in which the trial court rejected all the prayers offered by the parties and of its own motion instructed the jury,

> "1. That the defendant is not liable in this action unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers; and the facts that the carriage was upset, and the plaintiff's wife injured, are prima facie evidence that there was carelessness, or negligence or want of skill, on the part of the driver; and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault" (p. 185). To this the defendant excepted and in his brief contended "that the burden of showing that the accident was not occasioned by the driver's fault was improperly thrown upon the defendant" (p. 189). The Supreme Court said, "We think the court laid down the law correctly in each and all of these instructions" (pp. 191-193).

In Gannon v. Gas. Co., *supra*, 145 Mo., 502, plaintiff's decedent was killed by stepping on an electric wire of defendant which had broken and was lying on the pavement. The court said:

> "A prima facie case of negligence was made out against defendant, and the burden was then put upon it to show that its wires were down in the alley through no fault of its agents and servants. * * * The proof of facts that were alleged was adequate to cast the burden upon defendant of showing the non-existence of negligence on its part. * * * Here, by the well established facts a prima facie case was made out by plaintiff, and the onus was cast upon defendant of relieving itself from responsibility by showing that plaintiff's husband met his death as the result of an accident not occasioned by the want of that care and caution which the law made obligatory," etc.

The rule in Gannon v. Gas. Co., last above cited, is expressly reaffirmed in Brown v. C. L. P. & I. Co., *supra*, 109 S. W., 1032.

In the case at bar the plaintiff was entitled to the second instruction prayed by her and she was prejudiced by its refusal and by the granting of the first instruction prayed by defendant and in the general effect of the charge which was to leave the entire burden of proof upon her throughout the trial and to require expert testimony in support of that burden.

III. Idiosyncrasy.

If the plaintiff's condition was such as to predispose her to dangerous consequences from the operation, that fact does not relieve the defendant from liability for his negligent act which produced such consequences.

Mo. K. & T. Ry. Co. of Texas v. Byrd, 89 S. W., 991 (Tex. Civ. App., 1905).
Mullin v. Flanders, 73 Vt. 95, 50 Atl., 813.

In Sauers v. Smits, *supra*, 95 Pac., 1098, the court said:

> "If it should appear that physicians and surgeons in Aberdeen were as ignorant of the effect of X-ray exposures as some of the testimony tends to show, the jury might well conclude that the use of such a dangerous agency by one who had little or no knowledge of the probable consequences was negligence per se."

According to the expert testimony adduced for defendant, every X-ray operation is attended by risk of injury to the patient from unaccountable causes which the experts cannot explain or prevent, but attribute to indiosyncrasy in the patient or in the machine. Under such circumstances the use of the X-ray would be so reckless as to justify a verdict of manslaughter in a case of fatal injury.

After a physician had set the patient's arm, mortification set in, necessitating amputation. The court held, that if the mortification was caused by infection produced by applications before he set the arm and he knew of such applications having been made, it was his duty to see if the arm was infected thereby and to treat for such infection.

> Baute v. Haynes, 31 Ky. L. R., 876; 104 S. W., 272; 12 L. R. A. (N. S.), 752 (1907).

Testimony introduced by defendant (Rec. 7,) tended to prove that on plaintiff's first visit she was told by defendant's wife, acting as his assistant and in his hearing,

> "that while both she and her husband, the defendant, had subjected many persons to X-ray exposures and had never had any ill results, it was impossible by the use of any degree of care to prevent occasional X-ray burns from the use of the X-ray apparatus;" also, by experts, that "it is not possible in the use of the X-ray apparatus to guard absolutely against a resultant burn —that it was analogous to the use of chloroform from which death sometimes results, no matter what degree of care may be exercised in its use."

But uncontradicted testimony introduced by plaintiff (Rec. 6) tended to prove

> "that on her first visit, before any exposure, she told defendant that her employer, Baron Moncheur, had told her the X-ray was dangerous, in reply to which defendant told her there was no more danger to her than to himself and the defendant's wife, who was his assistant in his X-ray work, and who was then present, then said to the plaintiff that the defendant and his wife had never had an accident in all their experience and had no more reason to have one then than in the thousand and more exposures previously made by them."

And the defendant admitted at the trial (Rec. 10,) that where he stood.

"there was no danger whatever to him."

Upon the whole this was an assurance by the defendant to the plaintiff of her safety and she was entitled to the 4th instruction (Rec. 8.)

IV. Conclusion.

The first instruction for defendant (Rec. 9,) limited his liability to negligence in the "manner" of his operation. This liability should have been extended as stated in the 4th instruction prayed by plaintiff, but refused by the court whereby defendant's responsibility was stated to extend also to the truth of his representations to the plaintiff and whereby it was stated to be his duty to inform her of dangers which by proper inquiry or study should have been known to him.

The defence was in substance that in the use of the X-ray, accidents may happen despite the utmost care. That is not a good defense in law; and if it were so, the burden would surely be upon the defendant to establish it. In Kohner *vs.* Cap. Traction Co., 22 App. D. C., 181, 187, concerning the maxim *res ipsa loquitur*, the court said:

> "The res, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish or to justify the jury in inferring the existence of the traversable or principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the

defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present."

The defendant has not produced any such evidence. The ruling of the court as to burden of proof, taken in connection with those portions of the charge quoted in the 4th assignment of error as to expert testimony, practically required a verdict for the defendant, because it required the plaintiff to explain what the defendant and his expert witnesses could not explain, thus making ignorance on the part of specialists in the use of a most dangerous agency a good defence in an action for personal injury to a patient resulting from such ignorance.

V.

For the reasons above stated the judgment should be reversed and a new trial granted.

Respectfully submitted,

LORENZO A. BAILEY,
Counsel for Plaintiff in error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 60.

ANNE SWEENEY, PLAINTIFF IN ERROR,

vs.

WILLIAM G. ERVING.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of the Case.

This case arises on writ of error to the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court of the District entered upon a verdict of a jury in favor of the defendant in error, who was defendant below.

The plaintiff brought suit against the defendant, a physician practicing in the city of Washington, and a specialist in the operation of what is commonly known as X-ray apparatus, for both treatment and diagnostic purposes. The

charge was that of negligence of the defendant in conducting himself in the course of his employment by plaintiff, and operating the X-ray apparatus in an ignorant, unskilful, and negligent manner, whereby plaintiff's back was burned.

There are two counts in the declaration, the first of which contains the charge already mentioned, and the second count alleges want of due care in the making of a certain test upon the plaintiff's body, resulting in a burn thereof.

The only evidence of the plaintiff in support of her charge in the declaration was that, having been injured by a railway accident in which she claimed a fracture of a rib had occurred, she went to the defendant, on the suggestion of a surgeon of this city, Dr. Kerr, for the purpose of ascertaining by radiograph picture whether such a fracture existed. The employment of Dr. Erving was arranged by Dr. Kerr. She had previously been to Dr. Gray, who had made a radiograph picture, which had failed to disclose such a fracture. The plaintiff testified that she attended at the defendant's office four times, at each of which visits she was subjected to exposures of the X-ray; that at the fourth visit she felt certain effects (the nature of which was not disclosed), and asked the defendant to cease, and that the night of the day on which her fourth visit occurred her back became red and itchy; that about two weeks subsequent to the fourth visit referred to, she found her back was burned and defendant treated it until he left the city, about June 30, 1905, and that though treated by other physicians since then, no cure of the burn had taken place (6).

No testimony was offered by the plaintiff to show the length of time of the exposures of the X-ray, or that the defendant had been in any way negligent in his operation of the machine, or had conducted himself unskillfully, or that the circumstances surrounding her exposures thereto were other than those which usually occurred in similar instances. No expert testimony was offered by the plaintiff of any kind, nor was there any evidence produced by her

tending to show negligence or want of skill, or lack of due care on the part of the defendant. After the motion to return a verdict for the defendant at the close of the plaintiff's case had been overruled, the defendant introduced testimony tending to show that his X-ray machine was an excellent one, in good condition at the times the plaintiff was subject to exposure to it, and that she was told at the outset by the defendant and his wife, who assisted him in his operation of the apparatus, that while they had had no ill results from the many exposures which they had made, it was impossible, by the exercise of any degree of care, to prevent occasional burns from the use of the X-ray machine, and that she did not complain of any ill effects from the treatment until about seventeen days after the last exposure.

The defendant himself testified fully and in detail as to the character of his X-ray machine and the manner of the exposures used upon the plaintiff. Thereupon, on behalf of the defendant, six physicians of standing, expert in the literature and use and experience of the X-ray apparatus—after having been informed of the substance of defendant's testimony as to the character of his X-ray machine and the manner of its use upon the plaintiff and the duration of the several exposures to which she was subjected—testified that the machine was a good one and that the manner of its use with respect to the plaintiff was in accordance with the practice of careful and prudent X-ray operators (7, 8).

Each of the above-mentioned experts testified that according to his experience and his reading it was impossible to guard absolutely in the use of the X-ray against a resultant burn, its application being analogous to the application of chloroform, from which death sometimes results in spite of the highest degree of care exercised in its use. No evidence was introduced by the plaintiff to rebut the testimony of the defendant and his witnesses (8).

ARGUMENT.

Two propositions are advanced by counsel for plaintiff in error in support of his contention that the judgment below should be reversed, and the assignments of error may be considered as embodying these two propositions. The first is in sustaining the ruling of the trial court refusing to apply to the case the doctrine of *res ipsa loquitur,* and the second, in sustaining the trial court in its refusal to hold that a possible predisposition of the plaintiff in error to dangerous consequences from exposure to the X-ray did not relieve the defendant from liability for "his negligent act which produced such consequences." (The quotation is from page 13 of brief for the plaintiff in error.)

I.

The Doctrine of Res Ipsa Loquitur Does Not Apply to This Case.

On pages 10 to 13, both inclusive, of the brief for plaintiff in error, will be found a number of authorities cited by counsel in support of the proposition that the doctrine of *res ipsa loquitur* is applicable to the case at bar. Upon examination of these cases it will be found that all but five of them were cases in which negligence was charged against common carriers or public service corporations, most of the latter being in suits wherein electric wires, heavily charged, were found loose upon the public highway in violation of that high degree of care required of such corporations to protect the safety of those using the highways over which their franchise permitted the erection of their poles and wires. In four of the five cases mentioned wherein suits were brought for malpractice of physicians (Shockley *vs.* Tucker, 127 Iowa, 456; Heuslin *vs.* Wheaton, 91 Minn., 219;

Hickerson *vs.* Neeley (Ky.), 54 S. W., 842, and Sauers *vs.* Smits, 95 Pac., 1097 (Wash.),) the question of the burden of proof was not discussed or raised; but the facts and circumstances detailed in the reports indicate that positive evidence of the negligence of the physician was either introduced or required over and above the mere occurrence of the injury to the patient, while the fifth case (Anderson *vs.* McCarthy Dry Goods Company, 49 Wash., 398) grew out of a claim for damages against a dry goods company which operated an overhead basket-carrier system for conveying parcels, on the ground that the plaintiff was injured by one of the basket cars which had slipped off its running wire and had fallen upon the plaintiff. The court there held that the fact of the car running off the wire presupposed negligence either in the condition of the apparatus or in the running of it, because in the ordinary operation of the same no accident could occur.

In one of the cases cited by counsel for plaintiff in error, that of Heuslin *vs.* Wheaton, 91 Minn., 219, 222, wherein a physician was sued for negligence and unskillfulness in operating an X-ray apparatus to the injury of the plaintiff, the rule of liability in such a case was declared to be the same as in other actions for malpractice, namely, "such reasonable care and skill as is usually given by physicians and surgeons in good standing." The X-ray was used in that case for diagnostic purposes, to locate a foreign substance supposed to be in the lungs of the patient. The strongest case cited by opposing counsel is Shockley *vs.* Tucker, *Supra* in which the court, "without elaborating the questions presented," remarked that the fact that the plaintiff was severely burned was some evidence in itself that the treatment was improper. But the court in that case prefaces such remark with the statement that witnesses familiar with the results of the use of X-rays on the human body testified that the form of treatment might be such as to be injurious or not, depending on the length of time of application, and on the proximity of the machine to the body.

So far as the investigation of counsel has been able to throw light upon this subject, the case just mentioned is the only one even suggesting that evidence of an X-ray burn without something more is sufficient to make a *prima facie* case against a physician using an X-ray machine. The case is in direct conflict with the great weight of authority on the subject of the liability of physicians and surgeons in general, and X-ray operators in particular, as will be hereafter shown.

It may not be, perhaps, inopportune to advert upon certain elements relative to the doctrine of *res ipsa loquitur*. It seems to be well settled that that rule in a proper case may be inferred not from an accident alone, and never solely from an injury, but from an accident and its attending circumstances, together with the injury resulting therefrom. Benedick *vs.* Potts, 88 Md., 52; Griffen *vs.* Manice, 166 N. Y., 188, 193; Eaton *vs.* N. Y., &c., R. R. Co., 109 N. Y. Sup., 419. Counsel venture to assert that in no case is the doctrine applied where the only proof adduced by a plaintiff is the injury. Evidence of the cause of the injury must accompany proof of the injury itself in order that negligence may be presumed. In other words, negligence is presumed from the accident, not from its results. If a person is found on a railroad train in an injured condition, no presumption of negligence would arise unless it further appeared that the train had previously been derailed or had been involved in a collision or had sustained an unusual jolt or jar, from which the injury might have taken place

This proposition is well illustrated by the following decisions in Missouri:

In the case of Mitchell *vs.* C. & A. R. R. Co., 132 Mo. App., 143, cited on page 11 of the brief of plaintiff in error, a passenger on a freight train (which carried passengers on a branch line) was injured by being thrown violently from the caboose, caused by an extraordinary and unusual jar when two parts of the train were coupled together. It was held there that the jolt or jar being extraordinary, negli-

gence causing it must be presumed, because of the unusual nature of the occurrence.

In the case of Hedrick *vs.* R. R. Co., 195 Mo., 104, the plaintiff was also injured by a jolt or jar while riding upon a freight train as a passenger. In that case evidence showed the jolt or jar to be not extraordinary, but incident to the usual operation of freight trains, and the court held that no negligence should be presumed from such a jolt or jar. In neither case was any negligence presumed from the fact of injury, while the plaintiff was a passenger. In the one case it was presumed from the jolt and shock unusual in the ordinary operation of a freight train, and in the other case the presumption was denied because nothing unusual had occurred. So, in Sullivan *vs.* Cap. Trac. Co., 34 App. D. C., 358, wherein it was held that the doctrine of *res ipsa loquitur* does not apply to a case where a passenger is standing upon the platform of a car and receives injuries by the sudden jerk of that car rounding a curve. Reference to this case, in our judgment, renders unnecessary discussion of the case of Kohner *vs.* The Cap. Trac. Co., 22 App. D. C., 181, cited on pp. 10 and 11 of brief for plaintiff in error. And it will be found that in every case cited in the brief for the plaintiff in error wherein the doctrine of *res ipsa loquitur* has been applied, an extraordinary and unusual accident had taken place from which the injury resulted, and in no case was such presumption held to have arisen from the injury alone. Two cases are referred to in the opinion of the Court of Appeals in this case (Rec. 19), one of which is cited on brief of opposing counsel, which might appear at first sight not to come within the purview of the argument just made. They are Hickerson *vs.* Neeley, 54 S. W., 842 (Ky.), and Maratsky *vs.* Worth, 67 Minn., 46. Upon a perusal of these decisions, however, it will appear that in each case something out of the ordinary occurred as distinguished from the injury, which tended to contribute thereto.

Thus in Moratsky *vs.* Worth, a part only of the placenta at childhood had been removed. In the Hickerson case bandages and sand bags were used for five days around the patient's ankle, and it was then reset and incased in plaster for five weeks. The bones knit and healed but the foot was crooked. No evidence was adduced by the physician that the treatment, as shown by the plaintiff, was proper. The court said that they recognized the well-settled principle that physicians and surgeons are held to possess only that skill which is ordinary and usual among members of the profession in that community, but that in Kentucky a surgeon must have State board of health certificate to enable him to practice, and that the standard maintained by that board was so high a jury would be warranted in finding negligence of a surgeon who, in resetting a broken ankle, would leave it crooked. A direction of the lower court in favor of defendant was set aside on the ground that the case should have been submitted to the jury.

The great weight of authority, however, in cases of malpractice of physicians and surgeons, including the operation of an X-ray apparatus, requires that a plaintiff must affirmatively show the negligence of the practitioner.

In Wood *vs.* Barker, 49 Mich., 295, the fact of the slow healing and imperfect result of a surgeon's efforts upon a patient is held to be no evidence of malpractice. In that case the court said that "the jury could not rightly be allowed to find malpractice without testimony from persons who were qualified to give opinions on the method of treatment."

In Sims *vs.* Parker, 41 Ill. App., 284, it was held that proof of mishap of itself was no evidence of lack of skill, and before recovery could be had it must be shown that the treatment was improper or negligent.

In Sawyer *vs.* Berthold, 134 N. W., 120 (Minn., January 12, 1912), it was decided that negligence of a physician or surgeon cannot be inferred from a poor result alone. There must be evidence from expert witnesses tending to show im-

proper or unskillful treatment in order to sustain the charge of malpractice.

And see Leighton *vs.* Sargent, 31 N. H., 119, 136, where it was *held* that the burden of proof was on the plaintiff to show want of skill on the part of a physician.

Ewing *vs.* Goode, 78 Fed. R., 443 (C. C. Ohio), in which it was held that plaintiff must show that physician was unskillful and that the injury resulted therefrom; also that the doctrine of *res ipsa loquitur* was not applicable to a case of malpractice. The court (Taft, J.) remarks that where the case concerns a highly specialized act, as the treatment of the eye for cataract, &c., the court and jury must be dependent on expert testimony.

Pettigrew *vs.* Lewis, 46 Kansas, 78, 81, holding that the mere fact of injury is no proof of negligence on the part of a surgeon, and that expert evidence was necessary to show unskillfulness.

Neifert *vs.* Hasley, 149 Mich., 232, where the evidence, in the absence of expert testimony of the manner of treatment, was held insufficient to show negligence resulting in an operation amputating plaintiff's leg.

Smith *vs.* Dumond, 6 N. Y. Supp., 242 (Sup. Ct., Gen. Term), which was an action for malpractice in treating fractured leg causing permanent stiffness of ankle. The expert testimony showed that stiffness usually resulted to some extent in such cases, although highest skill be used. Held, no evidence of want of skill.

Piles *vs.* Hughes, 10 Iowa, 579, in which it was decided that after the setting of a broken leg, the fact that it was shorter than the other leg was no evidence of negligence.

Railway Co. *vs.* Ingram, 114 Ga., 639, 641, an action for negligence in treatment resulting in amputation. Held, burden on plaintiff to show want of due care which made necessary the amputation.

The degree of skill required by a physician is that ordinarily possessed and exercised by members of his profession in the same line of practice in that neighborhood.

Hueslin *vs.* Wheaton, *supra;*
Rich *vs.* Pierpont, 3 Fost. & F., 35;
Patten *vs.* Wiggin, 51 Me., 594;
Sheldon *vs.* Wright, 80 Vt., 298;
State *vs.* Housekeeper, 70 Md., 162;
McDonald *vs.* Harris, 131 Ala., 359;
Pike *vs.* Honsinger, 155 N. Y., 201;
Ely *vs.* Wilber, 49 N. J. L., 685, 687.
Boon *vs.* Murphy, 108 N. C., 187;
Gore *vs.* Brockman, 138 Mo. App., 231, 236-237.

Such, also, is the rule applied to those practicing osteopathy, Wilkins *vs.* Brock, 81 Vt., 332; 70 At. Rep., 572, and to veterinary surgeons, Barney *vs.* Pinkham, 29 Nebr., 350. Of the foregoing decisions, the following are cases involving the operation of the X-ray machine:

Heuslin *vs.* Wheaton, 91 Minn., 219;
Gore *vs.* Brockman, 138 Mo. App., 231.

Therefore, whatever the result of an operation or other effort of a physician may be, it follows that there must be some affirmative proof of the lack on his part of the standard of skill required as above. And this standard of skill is applicable also to the judgment of physicians. Brydges *vs.* Cunningham, 124 Pac., 131 (Wash., June 10, 1912).

It is submitted that in this case a verdict should have been directed for the defendant, because nowhere in the record of the plaintiff's evidence can there be found any testimony tending to show that the defendant was negligent as charged in the declaration in this case. It was submitted to the jury apparently because of plaintiff's evidence that defendant had informed her there was no more danger to plaintiff that to himself (6). Had there been any such

negligence or want of care the plaintiff should have produced some testimony tending to show that either the instrument was placed too near the plaintiff's body or that the exposures were of too great duration, or some such evidence indicating that the defendant had not pursued the ordinary and usual methods of operating the machine as known to the profession, especially in view of the fact that there is in the declaration no charge, and was at the trial no evidence, that the apparatus used was not of the type, perfection, or construction generally used or consonant with safe use, or that it was in any respect out of repair or imperfect in condition.

And when it is considered that the prayer relating to the burden of proof asked by the plaintiff below, in which it was sought to presume negligence from the mere fact of the burn, was offered after the testimony adduced in the whole case, in which the uncontradicted evidence of six physicians skilled in the literature, use, and experience of the X-ray apparatus had been given to the jury, showing beyond a peradventure that the appellee had done everything known to the profession using and operating such machines which the highest care, skill, and prudence required, further argument seems unnecessary to show that the plaintiff below carried the burden of proving the charge in her declaration, and could not rely upon the fact of injury alone.

Counsel for plaintiff in error at the beginning of his argument, on page 8 of his brief, asks, "Was expert testimony essential in order to prove negligence, as in cases against physicians and surgeons?"

This question seems to contain within it an admission that such testimony is necessary with reference to physicians and surgeons, meaning, presumably, in cases not involving the use of the X-ray, but ordinarily occurring in the usual practice of a doctor; and certainly many of the cases to which reference has been made point out the necessity of expert testimony, as has been stated. We think the authorities cited

above show that no difference exists in the application of the general rule relating to cases of malpractice between physicians practicing surgery or medicine and those also operating an X-ray apparatus. If this be so the implied admission contained in the question above quoted is fatal to the case of the plaintiff in error. However, a word may be said relative to the supposed difference in the rule between physicians and X-ray operators assumed by opposing counsel. The plaintiff in a case against an X-ray operator has the burden of proof to establish an allegation of negligence. If expert testimony is necessary to establish negligence, then such testimony becomes essential. And if it be wanting, then failure of proof follows. But where, as in this case, the plaintiff produces no testimony of any kind as to the length of time of exposure, or the proximity of the machine to her body, or as to other circumstances surrounding the treatment by the defendant, certainly expert testimony would seem to be essential to enable her to make out her case.

II.

AS TO PREDISPOSITION OR IDIOSYNCRASY.

Counsel for plaintiff in error seems to misconceive the application to the case at bar of the question of a patient's predisposition to injuries, having in mind apparently a situation wherein a patient's *previous illness* has been shown by evidence as a defense to negligence.

The cases cited by counsel on page 13 of his brief relate to such a situation. They hold that a plaintiff's ill health prior to treatment by a physician is not to be counted in the computation of the amount of damages which a jury may award to compensate a plaintiff for injuries due to the physician's negligence. The reference to the use of chloroform found at the top of page 8 of the record indicates clearly the proposition urged by the defendant in error, which is

that although injury by reason in part of predisposition thereto does not excuse negligence contributing to such injury, negligence is not to be presumed therefrom. And the injury may therefore be absolutely consistent with care and skill on the part of the physician, thus requiring of the plaintiff affirmative proof of want of such care and skill.

The plaintiff's prayer made the subject of the second assignment of error and supposedly raising the point now under discussion is fatally defective for three reasons: First, because there was no evidence tending to show that the defendant knew, or could have known, if such was the case, that the plaintiff's physical make-up was such as predisposed her to injury from the use of the X-ray, or that such a predisposition exhibited symptoms or manifestations discoverable or recognizable by the defendant or any operating physician; second, it required the defendant as operator of the X-ray apparatus to be possessed of skill enabling him to operate it with the utmost degree of safety, whereas the law requires only ordinary skill on his part in the treatment or diagnosis of the case such as is found in the profession to which he belongs and is exercised in the community in which he lives (Rich *vs.* Pierpont, *supra*, and other cases cited on page 10 of this brief); third, because there is no authority for the proposition that the defendant was required to inform the plaintiff that there was a remote possibility of her being so predisposed to injury. All the cases cited by counsel for the plaintiff in error in support of his contention on this point hold simply that where negligence has been found, a predisposition to injury will not exonerate from liability; but in these cases negligence was found or had to be found from all the evidence in the particular case. And in Mullin *vs.* Flanders, 73 Vt., 95, which was a malpractice case, it was held that the plaintiff could not recover for any diseased condition existing prior to his treatment, but that the defendant was liable only for injury attributable to his fault. But as the Court of Appeals in the case at bar has held, the defendant in error had a right to suppose that

his patient was in proper condition to be exposed to X-ray diagnosis, because she had been sent to him by a reputable surgeon under whose care she had been. This fact alone ought to dispose of the contention.

The illustration on this point given by the expert physicians who testified on behalf of the defendant as to the use of chloroform finds much support in the case of Bogle *vs.* Winslow, 5 Phila., 136 (Dist. Court), where it was held that an attendant or physician using chloroform as an anæsthetic is not answerable for negligence because of results arising from the peculiar temperament of the patient of which he had no knowledge.

What we have said in respect to the first assignment of error disposes of the third, fourth and fifth assignments.

In conclusion it is respectfully submitted that on the whole case the judgment of the Court of Appeals should be affirmed.

CHARLES L. FRAILEY,
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Of Counsel.

SWEENEY v. ERVING.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 60. Argued February 28, 1913.—Decided April 7, 1913.

Where the rule of *res ipsa loquitur* applies, it does not have the effect of shifting the burden of proof.

Res ipsa loquitur means that the facts of the occurrence warrant an inference of negligence, not that they compel such an inference, nor does *res ipsa loquitur* convert the defendant's general issue into an affirmative defense.

Even if the rule of *res ipsa loquitur* applies, when all the evidence is in it is for the jury to determine whether the preponderance is with the plaintiff.

Where the terms of a request to charge are self-contradictory and confusing, that reason is in itself a sufficient ground for the trial court to reject it.

A medical specialist, called on to operate upon the patient of another physician who has assumed the responsibility of advising the operation, does not, as a matter of law on the facts disclosed in this case, undertake the responsibility of making a special study of the patient's condition or of giving advice as to possibility of injury resulting therefrom.

35 App. D. C. 57, affirmed.

THE facts, which involve the liability of a medical specialist for injuries caused by burns resulting from an X-ray operation performed by him on the patient of another physician, are stated in the opinion.

Mr. Lorenzo A. Bailey for plaintiff in error:

Expert testimony was not essential in order to prove negligence, as in cases against physicians and surgeons. *Vaughan* v. *Menlove*, 3 Bing. N. C. 468, 475; *Oceanic Steam Nav. Co.* v. *Aitken*, 196 U. S. 589, 596.

The injury to plaintiff was caused by an agency in the

possession of the defendant and under his exclusive management and control. From this arises the presumption of negligence on his part and the burden then devolves upon him to overcome that presumption, if he can, by evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. *Res ipsa loquitur* applies. *Kohner* v. *Capital Traction Co.*, 22 App. D. C. 181, 187, 190; *Shockley* v. *Tucker*, 127 Iowa, 456, 458; *Heuslin* v. *Wheaton*, 91 Minnesota, 219; Wigmore, Evid., § 2509; *Hicherson* v. *Neely*, 21 Ky. L. R. 1257; *Sauers* v. *Smits*, 95 Pac. Rep. 1097; *Gannon* v. *Gas Co.*, 145 Missouri, 502; *Von Treba* v. *Laclede Gaslight Co.*, 209 Missouri, 648; *Brown* v. *Consolidated Light Co.*, 109 S. W. Rep. 1032; *Moglia* v. *Nassau Electric R. Co.*, 111 N. Y. Supp. 70; *Gurdon & Ft. S. Ry. Co.* v. *Calhoun*, 86 Arkansas, 76; *Mitchell* v. *C. & A. Ry. Co.*, 132 Mo. App. 143; *Eaton* v. *N. Y. C. & H. R. Co.*, 109 N. Y. S. 419; *Anderson* v. *McCarthy Dry Goods Co.*, 49 Washington, 398.

If the plaintiff's condition was such as to predispose her to dangerous consequences from the operation, that fact does not relieve the defendant from liability for his negligent act which produced such consequences. *Mo., K. & T. Ry. Co. of Texas* v. *Byrd*, 89 S. W. Rep. 991; *Mullin* v. *Flanders*, 73 Vermont, 95; *Sauers* v. *Smits*, 95 Pac. Rep. 1098; *Baute* v. *Haynes*, 31 Ky. L. R. 876.

Mr. A. S. Worthington and *Mr. Charles L. Frailey* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The plaintiff in error, who was likewise the plaintiff below, sued the defendant in error in the Supreme Court of the District of Columbia to recover damages for personal injuries, sustained, as was alleged, through his negligence in the making of certain X-ray tests upon her

body with the use of apparatus owned and operated by him. The defendant pleaded the general issue—"not guilty." Upon the trial, plaintiff adduced evidence tending to prove that she was under treatment by Dr. Kerr, a surgeon of the City of Washington, for the fracture of a rib, claimed by her to have been caused by the negligence of a railway company; that the company denied the existence of such fracture, and, at its request, she submitted to an X-ray diagnosis by Dr. Grey, a specialist; that his diagnosis and the radiograph made by him failed to disclose a fracture; that thereupon Dr. Kerr arranged with the defendant, Dr. Erving, a specialist in the use of the X-ray for diagnostic purposes, for an X-ray diagnosis to be made by him; that in pursuance of this arrangement she went four times to the defendant's office, the first time at Dr. Kerr's request, and on three subsequent occasions at defendant's request; that on the occasion of each visit, defendant subjected her to several exposures of the X-ray in the effort to obtain a satisfactory picture; that upon her first visit, and before any exposure, she told defendant that her employer had told her that the X-ray was dangerous, in reply to which defendant assured her that there was no more danger to her than to himself, and defendant's wife, who was his assistant in the X-ray work, and who was then present, assured the plaintiff that the defendant and his wife had never had an accident in all their experience, and had no more reason to have one in her case than in the thousand and more exposures previously made by them; that plaintiff felt no bad effects from the operation by Dr. Grey, nor from the operations by the defendant until her fourth visit; that during one of the exposures at the fourth visit, she felt bad effects and a sense of faintness, and about five hours later her back, which was the portion exposed to the X-ray in all the operations by the defendant, was red and irritated; that in the operation by Dr. Grey it was the

front part of the body that was exposed to the X-ray; that about two weeks after her fourth visit to the defendant, finding her back was burned and the injury developing, she returned to him and informed him of it, that he was the first physician who saw the burn, and he treated it from that time for two or three weeks; that since then, although treated by other physicians and in hospitals, the injury has not been cured, in consequence of which the plaintiff has not been able to work; that the injury is an X-ray burn, and caused and continues to cause much suffering. Plaintiff having rested, the defendant introduced evidence tending to prove that both he and his wife had had long experience in the use of the X-ray machine; that the machine to which the plaintiff was exposed by defendant was an excellent machine, in good condition; that on plaintiff's first visit she was told by defendant's wife, in the hearing of defendant, that while she and her husband had subjected many person to X-ray exposures, and had never had any ill results, it was impossible, by the use of any degree of care, to prevent occasional X-ray burns from the use of the apparatus; that at none of the visits of the plaintiff to the office of defendant for the purpose of being exposed to the X-ray apparatus did she make any complaint of ill effects from the exposure. Defendant himself testified fully respecting the character of his machine and the manner in which it has been used at each of the plaintiff's visits, and the length of each exposure and the result thereof. Thereupon several practicing physicians of experience testified as experts (having qualified by showing an acquaintance with the literature of the subject and also some practical experience in the use of the X-ray apparatus). Upon the basis of the defendant's testimony respecting the character of his X-ray apparatus and the manner of its use upon the plaintiff and the duration of the several exposures to which she was subjected, the experts testified that the machine

was a good one of its kind, and that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X-ray operators, and was as safe as exposures to the X-ray apparatus could be made; and each of these witnesses further testified that according to his experience and reading it was not possible in the use of the X-ray apparatus to guard absolutely against a resultant burn.

The case was submitted to the jury under instructions from the court, and they rendered a verdict in favor of the defendant. The plaintiff appealed to the Court of Appeals, where there was an affirmance (35 App. D. C. 57), and she sued out this writ of error.

The assignments of error present in effect but two questions—

1. The plaintiff requested the trial court to instruct the jury as follows:

"If you believe upon the evidence that in the course of the operation of the X-ray apparatus by the defendant the plaintiff was burned, that fact is of itself evidence of negligence on his part, and casts upon him the burden of proving, if he can, by a preponderance of evidence, that the plaintiff's injury was not caused, in whole or in part, by his negligence, and in such case, unless you find by a preponderance of the evidence that said injury was not caused in whole or in part by the defendant's negligence, your verdict should be for the plaintiff."

The trial judge refused this request, and on the contrary instructed the jury—"That the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the burn upon her back was caused by negligence on the part of the defendant in the manner in which he subjected her to exposure by the X-ray."

The contention in behalf of the plaintiff is that since the injury to the plaintiff was caused by an agency in the

possession of the defendant and under his exclusive management and control, there arises from this, coupled with the fact that personal injury resulted therefrom to the plaintiff, a presumption of negligence on defendant's part, upon the doctrine of *res ipsa loquitur*, and that the burden is thereby imposed upon him to overcome that presumption by a preponderance of evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. As will be seen, this contention includes two propositions; the first, that the case is a proper one for the application of the doctrine, *res ipsa loquitur;* the second, that the application of this doctrine relieves the plaintiff from the burden of proof and imposes that burden upon the defendant. These two propositions were coupled together in the requested instruction, and, upon familiar principles, no legal error was committed by the trial court in refusing the request, if either part of it was not well founded in law.

In the view we take of the matter, it is not necessary to pass upon the question whether the evidence presented a case for the application of the rule *res ipsa loquitur;* for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof.

The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened,

it may fairly be found to have been occasioned by negligence.

The doctrine has been so often invoked to sustain the refusal by trial courts to non-suit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part.

In *Stokes* v. *Saltonstall* (1839), 13 Pet. 181, 190, which was an action against a stage-coach owner to recover damages for an injury sustained by a passenger through the upsetting of the coach, the trial court instructed the jury that—"The facts that the carriage was upset, and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver, and throw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault;" and also, that it was incumbent on the defendant to prove that the driver was a person of competent skill and good habits, and that he acted on the occasion in question "with reasonable skill, and with the utmost prudence and caution." The judgment was sustained by this court against the contention (p. 193), that although the facts of the overturning of the coach and the injury sustained were *prima facie* evidence of negligence, they did not throw upon the defendant the burden of

proving that the overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, etc. A reading of the report shows that the case turned upon the high degree of care owing by carrier to passenger, and that the court did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue. Such is the effect that has uniformly been given to the decision. *New Jersey R. & T. Co.* v. *Pollard*, 22 Wall. 341, 346, 350; *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 455; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 554, 555; *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435, 443, 444; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 663.

In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.

Such, we think, is the view generally taken of the matter in well-considered judicial opinions.

Kay v. *Metropolitan St. Ry. Co.*, 163 N. Y. 447, was an action by passenger against carrier, and the New York Court of Appeals said (p. 453): "In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption (referring to *res ipsa loquitur*), but when the proof was all in the burden of proof had not

shifted, but was still upon the plaintiff. . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof." The rule thus declared has since been adhered to in the courts of New York. *Hollahan* v. *Metropolitan St. Ry. Co.*, 73 N. Y. App. Div. 164, 169; *Adams* v. *Union Ry Co.*, 80 N. Y. App. Div. 136, 139; *Dean* v. *Tarrytown &c. R. Co.*, 113 N. Y. App. Div. 437, 439. A similar view appears to be entertained in New Hampshire. *Hart* v. *Lockwood*, 66 N. H. 541; *Boston & Maine R. Co.* v. *Sargent*, 72 N. H. 455, 466. The same rule has been followed in a recent series of cases in the North Carolina Supreme Court. *Womble* v. *Grocery Co.*, 135 N. Car. 474, 481, 485; *Stewart* v. *Carpet Co.*, 138 N. Car. 60, 66; *Lyles* v. *Carbonating Co.*, 140 N. Car. 25, 27; *Ross* v. *Cotton Mills*, 140 N. Car. 115, 120; 1 L. R. A. (N. S.) 298, 301. In the *Stewart Case* the court said (138 N. Car. 66): "The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator, attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an acci-

dent, but simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence."

2. The sole remaining question is raised by the refusal of the trial court to instruct the jury, as prayed by the plaintiff, in the following terms: "If you believe upon the evidence that in the ordinary and careful operation of the X-ray apparatus upon a woman by an operator having the requisite knowledge and skill enabling him to operate it with the utmost degree of safety there is a possibility, which could not be foreseen by such an operator, of injury to the woman by reason of her condition or of any matter tending to predispose her to injury in consequence of such operation and that such possibility was known to the defendant or by proper inquiry or study should have been known to him, it was his duty to inform the plaintiff of such possibility before he operated upon her; and if you further believe upon the evidence that he failed to perform such duty, or that in the performance of the operation he failed to exercise the skill and care required of him as such operator, and that the plaintiff was thereby injured, your verdict should be for the plaintiff." The terms of this request are self-contradictory and confusing—dealing, as it does, with a possibility of injury to the plaintiff "which could not be foreseen" by the defendant, and combining inseparably with it the hypothesis that "such possibility was known to the defendant or by proper inquiry or study should have been known to him"—and for this reason alone it was properly rejected by the trial court. But, besides this, it does not appear that there was any evidence on which the jury could properly base a finding that there was danger of injury to the plaintiff by reason of her condition or of any other matter tending to predispose her to such injury; nor to sustain a finding that such possibility was known to the defendant, or by proper study or inquiry should have been known to him. Nor could it be

said, as matter of law, that defendant had undertaken any duty requiring him to make special study or inquiry respecting plaintiff's condition or the possibility of injury to her, or to advise her of such possibility of injury; for there was testimony, already referred to, that would have warranted a finding that Dr. Kerr had assumed the responsibility of advising the plaintiff respecting the propriety of her submitting to the operation.

No error being found in the record, the judgment is

Affirmed.